No. 3078

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA, as Trustee and Guardian of, and ex rel SAM WILLIAMS,

Plaintiff in Error

vs.

SEUFERT BROTHERS COMPANY, a corporation, and F. A. SEUFERT,

Defendants in Error

In Error to The District Court of the United States for the District of Oregon.

BRIEF OF THE UNITED STATES

CLARENCE L. REAMES,
United States Attorney,

ROBERT R. RANKIN,
Assistant United States Attorney,
Attorneys for Plaintiff in Error.

SWEENEY, VARNEY & STRAUB, PRINTERS, PORTLAND

No.....

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

UNITED STATES OF AMERICA, as Trustee and Guardian of, and ex rel SAM WILLIAMS,

Plaintiff in Error

vs.

SEUFERT BROTHERS COMPANY, a corporation, and F. A. SEUFERT,

Defendants in Error

In Error to The District Court of the United States for the District of Oregon.

BRIEF OF THE UNITED STATES

CLARENCE L. REAMES,
United States Attorney,

ROBERT R. RANKIN,
Assistant United States Attorney,
Attorneys for Plaintiff in Error.

SWEENEY, VARNEY & STRAUB, PRINTERS, PORTLAND

CONTENTS.

CASES CITED.

STATUTES CITED.

STATEMENT OF THE CASE.

This is a writ of error to the District Court of the United States of the District of Oregon, to review a judgment sustaining a demurrer to a complaint for recovery of damages to a scow fish wheel, the property of Sam Williams, an Indian allottee.

The complaint purposely alleges fully all pertinent facts from which the legal status of Sam Williams may be adjudicated. For the purpose of demurrer, these facts are admitted as true:

That the United States is the trustee and guardian of the confederated tribes and bands of Indians known as the Yakima nation and the individual members thereof, allotted upon the Yakima Indian Reservation in the State of Washington. Sam Williams is a full-blood Indian and citizen of the United States, born off the territorial limits of the Yakima Indian Reservation, but in the State of Washington. His mother is a member of the Cowlitz tribe of Indians, and his father a member of the Yakima tribe; he has lived for twenty-one years, last past, off the reservation and upon the south bank of the Columbia River in the State of Oregon and has there taken up a homestead under the laws of the

United States and lives there with his family, and has adopted the habits of civilized life.

He is allotted as Allottee No. 1525 upon the Yakima Indian Reservation to certain lands therein, to which a "trust patent" was issued in his favor for eighty acres of land on the tenth day of July, 1897, a portion of which allotment has always been, and now is, held in trust for Williams by the United States under the Act of Congress approved February 8, 1887 (24 Stat. 388, as amended by Act of Congress approved February 28, 1891, 26 Stat. 794); he is in charge and under the control of the Superintendent of the Yakima Indian Reservation, who has held, and now holds, certain moneys and trust funds as the property and for the use of Sam Williams.

On the 24th day of January, 1910, upon petition from Sam Williams and payment in full of the purchase price by the purchaser, the United States sold and gave title in fee by patent from the United States to one J. S. McMeachan, to forty acres of Williams' allotment on the Yakima Reservation; that by this sale there was derived certain money which was then placed to the credit of this allotment owner and which then became a trust fund for his use and benefit, and held in the custody and under the control of the United States by the Commissioner of Indian Affairs, and the Superintendent of the Yakima Indian Reservation; that all these proceedings were under the Act of Congress approved March 1, 1907 (34 Stat. 1018), and the rules and regulations prescribed by the Secretary of the Interior.

A substantial portion of the funds derived from said sale and held in trust of the United States were used by Sam Williams under the direction and in the manner formally authorized by the Commissioner of Indian Affairs, during the years 1909 and 1910, in the building, construction, maintenance and repairing of a scow fish wheel to be used in operating on the Columbia River between one and four miles above the city of The Dalles.

It is this scow fish wheel which is damaged and the United States, in its capacity as guardian and trustee of Sam Williams, brought this action to recover of the defendants compensation for their misconduct.

The demurrer challenges the legal status of the United States as trustee and guardian of Sam Williams. The trial court sustained the demurrer and dismissed the complaint.

The case involves a construction of Section 6 of the Act of February 8, 1887 (24 Stat. 388), as amended by the Act of May 8, 1906 (34 Stat. 182), commonly known and hereafter referred to as the Burke Act, viz.:

Section 6 of the Act of February 8, 1887 (24 Stat. 388), provided:

> That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or

> Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

The Act of May 8, 1906 (the Burke Act), amends section 6 of the Act of February 8, 1887, above quoted, to read as follows:

> That at the expiration of the trust period and the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or

enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property; PROVIDED, that the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs, at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent; PROVIDED FURTHER, that until the issuance of fee simple patents all allottees to

whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States; AND PROVIDED FURTHER, that the provisions of this Act shall not extend to any Indians in the Indian Territory.

The errors assigned relate generally to the trial court's decision that the United States is not the guardian and trustee of Sam Williams to so enable it to sue in his behalf in this instance.

QUESTIONS INVOLVED.

The main question is: Has the United States a right to sue as trustee and guardian of Sam Williams, in protecting the property which represents funds given him by the United States?

This question, in turn, depends upon: (1) Whether Williams is still a ward of the United States Government, and (2) can the United States sue to protect these trust funds after it has gone into the personal property of the allottee?

ARGUMENT.

The control of the United States over the Indians arises from two different sources in addition to the right given to Congress by the constitution to make all needful rules and regulations respecting the territory and other property belonging to the United States: (1) The commercial clause in the constitution giving Congress

the right to regulate commerce with the Indian tribes; and (2) a control declared by the courts of the United States, which control has arisen out of the necessities of the situation rather than any express grant of power; the principle that the Indians are a dependent people in a state of pupilage and are wards under the guardianship of this Government. This principle was first clearly recognized in case of United States versus Kagama (1886), 118 U. S. 375, where the power of the Federal Government to punish murder and crimes, not referable to the commercial clause, was upheld.

The second power given with the right of the Government to dispose of its own property is called into service in the determination of this case.

The decision of the trial court is based upon an opinion that Williams is deprived of the protection afforded by wardship of the Federal Government, because (1) he is a citizen, (2) he has waived by his conduct any claim of legal disability, and (3) his status as an allottee relates alone to his land and does not extend to his general wardship under the Government.

WARDSHIP.

Proof that the Yakima nation, of which Sam Williams is a member, has been repeatedly recognized as one of the dependent Indian tribes of the United States, is disclosed by judicial notice of the many Congressional acts dealing with the commercial relations and disposition of property of that nation, along with repeated de-

cisions in liquor cases, under prosecutions for violation of Act of January 30, 1897 (29 Stat. 506), by the courts of Oregon and Washington that the allotted residents of this reservation are wards of the Government.

The dependent tribes mentioned in the Yakima treaty of June 9, 1855 (12 Stat. 951), as comprising the Yakima nation, have been repeatedly held by the courts to be wards of the United States. This general principle was clearly announced by the Supreme Court in the case of United States versus Kagama, 118 U. S. 375:

> (p. 383) "These Indian tribes are the wards of the nation. They are communities dependent on the United States—dependent largely for their daily food, dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill-feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen."

And the specific instance where these very tribes were so adjudicated as wards may be found in the case

of United States ex rel Sam Williams v. Seufert Bros. Co., 233 Fed. 579.

As the Supreme Court in the case United States versus Holliday, 3 Wall 407, 417, said:

> "Commerce with the Indian tribes means commerce with the individuals composing those tribes,"

so on the same reasoning was the holding in the Kagama case, that the "Indian tribes are the wards of the nation," meaning the individual members of these tribes are also wards of the Federal Government. They are so treated by all branches of the Government.

The Yakima tribe is recognized as one of these dependent tribes and its allottees, while resident upon the reservation, are recognized as wards of the Government. This is disclosed by Congressional enactment and local decisions too numerous to mention, and is probably not denied by the defendants in error herein.

STATUS OF ALLOTTEES.

The Act of February 8, 1887 (24 Stat. 388), known and hereafter called the General Allotment Act, did not abolish the wardship of the Indians.

The trial court, in declaring Sam Williams a citizen and out of the wardship of the Government, has quoted from the Allotment Act, as follows:

> "Every Indian born within the territorial limits of the United States * * * who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

And the conclusion of the trial court has been practically summarized by the Supreme Court in the Matter of Heff (1905), 197 U. S. 488, which the trial court particularly recognized as overruled:

> (p. 509) "We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the State, it places him outside the reach of police regulations on the part of Congress; that the emancipation from Federal control thus created cannot be set aside at the instance of the Government without the consent of the individual Indian and the State, and that this emancipation from Federal control is not affected by the fact that the lands it has granted

> to the Indian are granted subject to a condition against alienation and incumbrance, or the further fact that it guarantees to him an interest in tribal or other property."

But after the Heff decision, Congress in the Burke Act, May 8, 1906, particularly declared:

> "That until the issuance of a fee simple patent all allottees to whom trust patents shall hereafter be issued, shall be subject to the exclusive jurisdiction of the United States."

In fairness to the court, it is to be stated that the act by its terms did not appear to be, and by the report of the committee of the House of Representatives (H. R. 1558, 59th Congress, 1st Session, February 21, 1906), accompanying H. R. 11946 (afterwards the Burke Act), would not indicate that the legislative intent was to make the provisions retroactive. It does disclose that Congress immediately sought after the Heff decision to declare their future intention (if they had not already indicated that in the General Allotment Act) to retain control over the Indians who had not received full or fee patents to their lands.

However, in furtherance of the Burke Act, the Supreme Court has overruled the Heff case, first impliedly in the case of United States versus Pelican (1914), 232 U. S. 442, and definitely in the case of United States versus Nice (1916), 241 U. S. 591, holding:

> (p. 596) "This act, like that of 1889, disclosed

> that the tribal relation, while ultimately to be broken up, was not to be dissolved by the making or taking of allotments, and subsequent legislation shows repeated instances in which the tribal relation of Indians having allotments under the act was recognized during the trust period as still continuing."

Not only has this dependent relation since the Heff decision been judicially recognized, but on the administration of Indian affairs Congress still contemplates that allottee Indians are wards of the United States. Such has been shown in their general treatment:

1. After the General Allotment Act and up to the decision in the Nice case, these allottee Indians still remained under the charge of an Indian agent and superintendent, as Sam Williams in this case has remained under the charge and superintendence of the agent of the Yakima Indian Reservation. This relationship continues. These agents have certain powers over the Indians, among which are:

(a) To protect Indian allottees desiring to adopt habits of civilized life in the quiet enjoyment of the lands allotted to them (R. S. 2119).

(b) To sell stock belonging to Indians for their benefit (R. S. 2127).

(c) To manage and superintend intercourse with the Indians and execute regulations and duties pre-

scribed by the President, Secretary of the Interior, or Commissioner of Indian Affairs (R. S. 2058).

2. Allotted Indians remain wards and tribal Indians to such an extent that the Secretary of the Interior may by regulation decide who may be regarded as members of the tribe. Some objection has been made to the enrollment of Sam Williams as a member of the Yakima tribe. Under Sections 441 and 463, the latter provides:

> "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of the Indian relations."

And the Supreme Court has said:

> "The right (to determine who are members of the band) is conferred upon members of the bands, but the ascertainment of membership is left wholly at large. No criteria of adoption are stated. The Secretary must have authority to decide on membership in a doubtful case, and if he has it in any case he has it in all."

And in the absence of any expression by Congress, conferring on the courts an appeal from the Secretary's decision, none will be granted.

> United States ex rel West v. Hitchcock (1907), 205 U. S. 80.

And Sam Williams has been enrolled as a member of

the Yakima tribe for years and has been consistently so regarded. It is submitted that it does not now rest in the power of any third party to challenge the procedure or claim any adverse condition. The determination of the Secretary of the Interior is binding on this court (West v. Hitchcock, supra), and it must be admitted that Sam Williams is a Yakima Indian and as such enrolled as a regular allottee upon that reservation. Such is:

> "But an exercise of the administrative control of the Government over the tribal property of tribal Indians and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continue." Sizemore v. Brady (1914), 235 U. S. 441, 450.

3. The Government retains control over allottee Indians to the extent of providing schools for them. The report of the Commissioner of Indian Affairs for the year ending June 30, 1915 (table 3, page 74, et seq.), shows that the number of Indians in the United States (excluding the five civilized tribes, the Osages, Sacs and Foxes, in what was formerly Indian Territory, to whom, with the Miamis and Peorias in Indian Territory who are not excluded, the act of 1887 was not applicable), who were under the supervision and guardianship of the United States, was 205,508, of which 78,581 are allotted. Of the 21,082 Sioux Indians under Federal control in South Dakota, 17,839 are allotted, and 16,230 held trust or restricted fee patents. In the administration of these allottees they are governed as to

their allotment without respect to the fact that they may have lands or reside elsewhere.[1] The claim of the trial court that Sam Williams has disassociated himself from his tribe, departed from the reservation, lived twenty-one years among civilized people off the reservation, has taken up civilized life and a homestead, does not relieve him from Federal control as an allottee of the Yakima Indian Reservation, nor can voluntary conduct on the part of the ward release the ward from such status.

It is admitted and can be judicially noted that the tribal relations of the Yakima Indians still continue, and they, as well as Sam Williams in particular, continue under the care of an Indian agent, and the records of the Indian Office disclose that Williams, among the others, has been carried for a number of years on the rolls of the Yakima Indian Reservation as such member of the Yakima tribe; that he is located on the Yakima Reservation, and has received his share of annuities as such member. If Congress, through its proper agency and in ways indicated by the statutes, has placed Sam Williams in his present status as an allottee, it is for Congress and not for any court to say when this tribal existence shall have terminated and the ward cannot take upon himself by word or conduct the authority of making this termination.

The Supreme Court, in holding that neither these allotted lands nor the improvements thereon were subject to taxation, in the case of United States versus Rickert (1903), 188 U. S. 432, said:

[1] For example, the annual report of the Commissioner of Indian Affairs for the fiscal year ending June 30, 1916, shows the population on the Yakima reservation to be 3086, but there are 4487 allottees on the reservation.

> (pp. 442-443) "It is not a relation simply of contract, each party to which is capable of guarding his own interests, but the Indians are in a state of dependency and pupilage, entitled to the care and protection of the Government. When they shall be let out of that state is for the United States to determine without interference by the courts or by any state. The Government would not adequately discharge its duty to these people if it placed its engagements with them upon the basis merely of contract and failed to exercise any power it possessed to protect them in the possession of such improvements and personal property as were necessary to the enjoyment of the land held in trust for them."

And in the case of United States versus Sandoval (1913), 231 U. S. 28, the court said:

> (p. 46) "Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States, are to be determined by Congress, and not by the courts."

And in Tiger versus Western Investment Company (1911), 221 U. S. 286, the court said:

> (p. 315) "Taking these decisions together, it may be taken as the settled doctrine of this court that Congress, in pursuance of the long established policy of the Government, has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease. It is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage."

And, furthermore, it is not to be presumed that Congress intended by any inference to dispose of its guardianship. The Supreme Court stated that such determination must require a clear expression. This statement was made in the case of United States versus Forty-three Gallons of Whiskey (1883), 108 U. S. 491:

> (p. 496) "It would require very clear expressions in any general legislation to authorize the inference that Congress purposed to depart from its long established policy in regard to a matter of so vital importance to the peace and to the material and moral well-being of these wards of the nation."

And in all cases where Congress has terminated tribal status it does so in express terms. See Act of July 1, 1902, c. 1375, Sec. 63 (31 Stat. 716), provided that "the tribal government of the Cherokee nation shall not continue longer than March 21, 1906." Act of March 1, 1901, c. 676 (31 Stat. 861), providing that "the tribal government of the Creek nation shall not con-

tinue longer than March 4, 1906, subject to such further legislation as Congress may deem proper." See also Act of June 16, 1906, c. 3335, Sec. 25 (34 Stat. 280), in which mention is made of "any Indian who has severed his tribal relations, etc."

GRANTING CITIZENSHIP.

As one of the reasons why the trial court saw fit to decide that the United States was not the guardian of Sam Williams, it declared that Section 6 of the General Allotment Act of February 8, 1887, imposed on Sam Williams citizenship.

State Control.

The contention of the Government in this particular is that citizenship has been imposed on Sam Williams, but citizenship and wardship are not inconsistent. The General Allotment Act of 1887, together with the Burke Act, in granting to Williams the benefits of and subjecting him to "the laws, both civil and criminal, of the state or territory in which they (he) may reside," did not subject the allottee to all state laws, but only such as come within the purview of state legislation, that is, to such laws as deal with subjects over which the state, and not the United States, has control.

In commenting on this declaration of state jurisdiction, the Supreme Court, in the case of United States versus Nice, 241 U. S. 591, said:

(p. 600) "The words (above quoted), al-

though general, must be read in the light of the act as a whole and with due regard to the situation in which they were to be applied. That they were to be taken with some implied limitations, and not literally, is obvious. The act made each allottee incapable during the trust period of making any lease or conveyance of the allotted land, or any contract touching the same, and, of course, there was no intention that this should be affected by the laws of the state. The act also disclosed in an unmistakable way that the education and civilization of the allottees and their children were to be under the direction of Congress, and plainly the laws of the state were not to have any bearing upon the execution of any direction Congress might give in this matter."

And in the Pelican case, 232 U. S. 442, the court said:

(pp. 450-451) "It is true that by section six of the act of 1887, 24 Stat., p. 390, it was provided that upon the completion of the allotments and the patenting of the lands to the allottees under that act, every allottee should 'have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory' in which he resided. See Matter of Heff, 197 U. S. 488. But, by the act of May 8, 1906, c. 2348, 34 Stat. 182, Congress amended this section so as distinctly to postpone to the expiration of the trust period the subjection of allottees under that act

> to state laws. The first part of the section as amended is: 'That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside.' And, at the same time, there was added to the section the explicit proviso: 'That until the issuance of fee simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States.' We deem it to be clear that Congress had the power thus to continue the guardianship of the Government; * * * * and these provisions leave no room for doubt as to the intent of Congress with respect to the maintenance of the Federal jurisdiction over the allotted lands described in the indictment."

The state cannot tax Williams' allotment or the improvements thereon, and Congress is still under these acts to carry out its constitutionally declared duty to protect the Indian allottees who still remain, in fact, Government wards insofar as they are under the charge of an Indian agent and one who, in fact, is a member of the Indian tribe.

For example, would it not be perfectly proper if Sam Williams and his wife had children for the superintendent of the Yakima agency to compel those chil-

dren to attend the Yakima Indian school, and would it be possible for the state to also compel the attendance of these children in the state schools at The Dalles, Oregon?

The question of what effect should be given the above quoted expression of Congress, subjecting the Indian allottees to the "laws, both civil and criminal, of the State or Territory in which they may reside," has many times been before the Supreme Court. The trend of authority and the last expression of the Supreme Court upon this matter above given clearly indicate that Congress has retained control over the allottees upon reservation lands and has restricted alienation, as was intended should be done by the framers of these provisions. This must be true not solely for the purpose of protecting the Indian himself, but to protect his property as well, and by the above quoted term it was intended to subject the Indian only to such state laws as were not incompatible with Federal control and protection.

The granting of citizenship does not *ipso facto* terminate tribal relations. For example, under the Act of March 3, 1901, c. 868 (31 Stat. 1447), every Indian in Indian Territory was declared to be a citizen of the United States, but Congress did not terminate the tribal government and status of the Cherokees and Creeks until March 4, 1906. With respect to the Choctaws and Chickasaws, Congress declared that citizenship should not accrue until "their tribal government shall cease" (Act June 28, 1898, c. 817, Section 29, 30 Stat. L. 495).

The General Allotment Act of 1887 provided that citizenship accrued upon allotment of lands to Indians coming within the provisions of the act, and this same act contemplated the continuation of tribal relations. In commenting upon this fact, the Supreme Court, in the Nice case, said:

> (p. 599) "Section 5 expressly authorizes negotiations with the tribe, either before or after the allotments are completed, for the purchase of so much of the surplus lands 'as such tribe shall, from time to time, consent to sell,' directs that the purchase money be held in the Treasury 'for the sole use of the tribe,' and requires that the same, with the interest thereon, 'shall be at all times subject to appropriation by Congress for the education and civilization of such tribe . . . or the members thereof.' This provision for holding and using these proceeds, like that withholding the title to the allotted lands for twenty-five years and rendering them inalienable during that period, makes strongly against the claim that the national guardianship was to be presently terminated."

From all Congressional action it will be noted that citizenship and tribal status are not exclusive of each other; they may co-exist.

The question of whether Indians have become fully emancipated and their wardship destroyed depends not upon any grant of citizenship by Congress, but upon

whether they are still recognized as dependent people with continuing tribal relations by the executive and legislative branches of the Government. This was stated by the Supreme Court in the case of United States versus Sandoval, 231 U. S. 28:

> (pp. 47-48) "It is said that such legislation cannot be made to embrace the Pueblos, because they are citizens. As before stated, whether they are citizens is an open question, and we need not determine it now, because citizenship is not in itself an obstacle to the exercise by Congress of its power to enact laws for the benefit and protection of tribal Indians as a dependent people."

And in United States versus Celestine, 215 U. S. 278, the court said:

> (pp. 290-291) "Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with the rights and obligations of citizens of the United States. Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for

Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear the question is at an end.

Notwithstanding the gift of citizenship, both the defendant and the murdered woman remained Indians by race, and the crime was committed by one Indian upon the person of another, and within the limits of a reservation. Bearing in mind the rule that the legislation of Congress is to be construed in the interest of the Indian, it may fairly be held that the statute does not contemplate a surrender of jurisdiction over an offense committed by one Indian upon the person of another Indian within the limits of a reservation; at any rate, it cannot be said to be clear that Congress intended by the mere grant of citizenship to renounce entirely its jurisdiction over the individual members of this dependent race. There is not in this case in terms a subjection of the individual Indian to the laws, both civil and criminal, of the state; no grant to him of the benefit of those laws; no denial of the personal jurisdiction of the United States."

And in United States versus Nice, 241 U. S. 591, the court said: That provision for holding and using the proceeds from their lands, like that provision withholding the title to the allotted lands for twenty-five years, "show that the Government was retaining control of the property of these Indians, and the one relating to the use by Congress of their moneys in their 'education and civilization' implies the retention of a control reaching far beyond their property."

While the General Allotment Act of 1887 granted citizenship to allotted Indians and subjected them to state laws, it did not abolish the tribal relations and the Yakima tribe in particular did not deprive Congress of its power to further deal with them. Section 5 of the Act clearly contemplated the continued status of these allotted Indians as members of the Yakima tribe.

NO SPECIAL GUARDIANSHIP.

The trial court decided that the United States still remained Williams' trustee so far as the title to his allotment and money from his membership in the Yakima tribe were concerned, but said such "can have no bearing on the question as to whether he continues to be a ward of the Government."

In this expression it is admitted that for some purposes the Indian is the ward and the Government the trustee. The admission necessitates the conclusion that he has for some purposes been in a state of wardship.

Under the decisions of the Supreme Court it must be admitted that neither the Indian nor the court can change this condition of dependence. As was said in the Nice case:

> (p. 598) "Of course, when the Indians are prepared to exercise the privileges and bear the burdens of one *sui juris,* the tribal relation may be dissolved and the national guardianship brought to an end, but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial."

And Congress has not in any express terms disclosed its desire to relieve Williams of his wardship.

If Sam Williams is a ward for some purposes, where is there an expression of Congress that has removed him from an entire status as a ward, so far as his person and property are concerned? Certainly none of the acts discussed do so and it has been purposed to discuss all acts pertaining to such matter.

As indicating that Congress contemplated the legal status of the Indian should be indicated by the amount of liberty he was allowed over his own allotment, the Indian Appropriation Act of March 3, 1893 (27 Stat. 612-631), are helpful. This act was passed within six years after the General Allotment Act and Congress showed that it considered allottee Indians to be still wards of the nation, both in person and in property. The act provided:

> "In all states and territories where there are reservations or allotted Indians the United States District Attorney shall represent them in all suits at law and in equity."

This statute is still in force. It constitutes a clear declaration by Congress that allotted Indians were not yet thought capable of managing their own personal affairs, and that they were still personal wards of the Government, notwithstanding the grant of citizenship made by the allotment act of 1887.

Assistant Attorney General Van Devanter (now Mr. Justice Van Devanter of the Supreme Court), in an opinion, rendered November 23, 1897, construing this provision (25 Land Dec. 426), held that it was not confined to suits arising under laws relating to the public lands, but that the language is "broad and comprehensive enough to include all actions to which an Indian coming within its terms is a party."

> To bring him (i. e., an allotted Indian) within the purview of the law in question, it must, however, appear either that the United States still retains and exercises control over said land, or that the individual still maintains his tribal relations, and therefore remains under the care and protection of the United States.

This opinion has been followed by the Department of Justice to the present day, and United States attorneys are instructed to represent allotted Indians in suits affecting all their rights.

It must be clear that Sam Williams was not removed from such charge by any provision in the general allotment act, for not even the phrase, "subject to the laws, civil and criminal, of the state," worked any change in his status, so far as concerned the control which the United States retained over him through its Indian agent.

No more can be said of the status of the murdered Indian on the Colville, another reservation in the same State of Washington, than can be said of the status of Sam Williams. They are identical, yet the Supreme Court, in the case from the Colville Indian Reservation, said:

> (pp. 451-452) "It is alleged, as already stated, that the deceased was 'a full-blood Indian, a member of the Colville tribe,' and, further, that he had received an allotment of land under the act of 1887, as amended in 1891, and under the act of July 1, 1892, the land being held in trust by the United States for twenty-five years from the date of the patent, July 31, 1900. Upon this statement the deceased must be regarded as one who was still under the Government's care. Congress had not terminated that relation, and the commission of a crime against his person upon Indian lands, such as we have found the allotted lands in question to be, was punishable under the laws of the United States."
>
> United States v. Pelican, 232 U. S. 442.

Similar expressions are found in United States versus Celestine (1909), 215 U. S. 278, 291, and Perrin versus United States (1914), 232 U. S. 478, 487.

The acid test of whether or not Sam Williams is a ward of the United States Government and whether his allotment status has any bearing upon this case, is made when the question is asked: Could one selling intoxicating liquor to Sam Williams have been prosecuted under the act of June 30, 1897 (29 Stat. 506)?

Judge Sanborn said, in Farrell versus United States C. C. A. 8th 1901), 110 Fed, 942:

> (p. 950) "The review of the provisions of the acts of Congress and of the treaties which are relevant to the question at issue in this case is now completed, and it leads us to seriously question the main premise of the argument for the plaintiff in error, viz., that Congress has no power to reglate commerce with any citizen of the nation. These Indians are citizens, but they were originally wards. The nation had the right to prohibit the sale of liqor to them and to control and superintend their acts and proceedings. They were reasonable, friendly, peaceable, when sober; wild, passionate and dangerous, when drunk. It adopted the settled policy of prohibiting the sale of intoxicating liquors to them to protect Indians and white men alike. Had it not the right to grant them all the privileges and immunities of citizens, and still to retain its power to protect

them and their neighbors from the baleful effects of intoxication? The question is susceptible of but one true answer. It had the same right and authority to retain this power of control over the commerce with these Indians that it had to retain the title to their lands in trust for them for 25 years or longer. It is contended that the retention of this control is inconsistent with the grant to them in the act of 1887 of all the rights, privileges and immunities of citizenship. But the privilege of buying whiskey at all times and in all places is not one of the rights privileges or immunities of citizenship, within the meaning of the constitution of the United States."

And again:

(pp. 950-951) "The Government then had the power to retain its control over this baneful traffic with these Indians and its retention was not inconsistent with its grant to them of the rights, privileges and immunities of citizenship. Did it exercise its right and retain its power? It had this authority prior to the allotments under the act of 1887, and the burden is on him who assails it to show that it has been released or renounced. It had been the unvarying policy of the nation to retain and exercise this power for more than half a century. The wards of the Government needed protection from this pernicious traffic as much after their allotments had been made and their patents had been issued as

they did before. The issue of patents to them did not change the appetites, passions, character, habits, disposition, or capacity of these Indians. It did not radically change the title to the lands reserved for them, or their need of care and education. The Government held the title to their reservations in trust for them collectively before; it held the title to their allotments in trust for them individually after, the issue of the patents. There was every reason why Congress should retain and exercise its power to superintend the trade with them, and none to induce it to renounce it."

And further said:

(p. 951) "Neither the act of 1887 nor any other act of Congress or treaty with these Indians required those who selected allotments and received patents and the privileges and immunities of citizenship to sever their tribal relation, or to surrender any of their rights as members of their tribes, as a condition of the grant, so that after their allotments, as before, their tribal relation continued."

Sam Williams is in the same status as Fred Nice, and in the Nice case the Supreme Court said:

(p. 601) "In addition to the fact that both acts—the general one of 1887 and the special one of 1889—disclose that the tribal relation and the

wardship of the Indians were not to be disturbed by the allotments and trust patents, we find that both Congress and the administrative officers of the Government have proceeded upon that theory. This is shown in a long series of appropriation and other acts and in the annual reports of the Indian Office.

As, therefore, these allottees remain tribal Indians and under national guardianship, the power of Congress to regulate or prohibit the sale of intoxicating liquor to them, as is done by the act of 1897, is not debatable."

NO POWER TO SUBJECT INDIAN WARDS TO STATE LAW IN VIOLATION OF CONSTITUTIONAL DUTY.

Not only did Congress not intend to subject Indian allottees to state laws which would interfere with the exclusive constitutional power to protect them, and regulate commerce with Indian tribes, but Congress had no power so to do.

United States v. Nice (1916), 241 U. S. 591, 597.

APATHY OF STATE AUTHORITIES.

Since state authorities have no power to to tax these Indian allotments or personal property thereon issued

by the United States, they have no particular interest in the Indian welfare.

This is shown in several ways. It is illustrated by the expense and litigation involved by this very Indian in asserting his claim under state laws. The Oregon Fish and Game Commission have consistently refused to act in determining the right of Sam Williams to fish at this place, his priority of license, or to give him any aid whatsoever. When compelled by the decision in United States ex rel Sam Williams versus Seufert Brothers Company, 232 Fed. 578, now on appeal to the Supreme Court, to resort to the state court, venue was sought in Multnomah County and Sam Williams prevailed on all points upon which the Oregon Fish and Game Commission should have aided him under their own powers. Further attitude of state officials is indicated in the report of the Commissioner of Indian Affairs, 1906, p. 39:

> "The superintendent in charge of the Yakima Reservation reported on July 21, 1906, that the prosecuting attorney of the county informed him that as the Indians do not pay taxes he does not propose to put the county to any expense in prosecuting them or in giving them protection, especially when crimes are committed on the reservation; this policy, he says, is in accordance with the instructions of the county commissioners."

RIGHT TO SUE FOR DAMAGES.

In the case at bar, not only is the Government forced to prove its right to sue as a guardian and trustee of the ward, but is also forced to disclose a right to follow the money derived from the sale of trust lands held for Williams and sue for damages to the property into which those funds have been resolved.

The authority for proceeding in the case at bar rests in statute and decision.

To show the extent to which the Government is authorized to go under the general allotment act, the Supreme Court, in the case of United States versus Nice, said:

> (p. 599) "Section 5 expressly authorizes negotiations with the tribe, either before or after the allotments are completed, for the purchase of so much of the surplus lands 'as such tribe shall, from time to time, consent to sell,' directs that the purchase money be held in the Treasury 'for the sole use of the tribe,' and requires that the same, with the interest thereon, 'shall be at all times subject to appropriation by Congress for the education and civilization of such tribe . . . *or the members thereof.*' This provision for holding and using these proceeds, like that withholding the title to the allotted lands for twenty-five years and rendering them inalienable during that period, makes strongly against the claim that the

national guardianship was to be presently terminated. The two together show *that the Government was retaining control of the property of these Indians, and the one relating to the use by Congress of their moneys in their 'education and civilization' implies the retention of a control reaching far beyond their property.*"

Mr. Justice Harlan, in speaking for the court in United States versus Rickert, 188 U. S. 432, 444, gave a decision on a question referred by the Circuit Court of Appeals for the Eighth Circuit, as to whether the United States had such interest in the attempt of the state to tax an allotment and the personal property awarded by the Government to the Indian allottee thereon, as to maintain a suit in equity to enjoin the collection. He said:

> (p. 444) "In view of the relation of the United States to the real and personal property in question, as well as to these dependent Indians still under national control, and in view of the injurious effect of the assessment and taxation complained of upon the plans of the Government with reference to the Indians, it is clear that the United States is entitled to maintain this suit. No argument to establish that proposition is necessary."

The Indians in the Rickert case were members of a recognized dependent band of Indians, wards of the United States, and under its supervision residing on the agency and holding allotted lands to which the United

States had the fee simple title. With the exception of residence, which is immaterial, the other facts are true of the status of Sam Williams.

In United States versus Gray et al. (C. C. A. 8th 1912), 201 Fed. 291, the question was raised whether the United States had capacity to sue a lessee of an Indian allotment and the sureties for breaches of covenants of a lease made by the allottee. Circuit Judge Sanborn gave a clear and forceful decision, in which he said, in part:

> (p. 293) "But for more than a century it has been and still is the governmental policy of the United States to exercise the power granted to it by the Constitution (Article 1, S. 8, Subd. 3) to protect the Indians and their property from the greed, rapacity, cunning and perfidy of the members of the superior race, which have so often driven them to poverty, despair and war, and to teach and persuade them to abandon nomadic habits and to adopt and practice the arts of civilization. In order to carry out this policy it has reserved and held in trust for them large tracts of land and large sums of money derived from their release of their rights of occupancy of their lands in this country, it has controlled and managed their property for them, it has furnished them with houses, barns and other permanent improvements, with domestic animals, means of subsistence, and money in small amounts. It has provided them with Government agents to advise

> them and to protect their property, and with physicians, farmers, schools and teachers to instruct them. And while, under the act of 1887, Niccowree has become a citizen of the United States and subject to its laws and the laws of the state in which he resides (24 Stat. 390, S. 6), the United States is still pursuing its policy of protection and instruction, and his property is still in charge of the Indian agent of the Uintah and Ouray agency."

The learned judge's further statement is particularly applicable to the case at bar, even to the protection required from "the rapacity and faithlessness" of the defendant:

> (p. 293) "The civil and political status of the Indians does not condition the power of the Government to protect their property or to instruct them. Their admission to citizenship does not deprive the United States of its power, nor relieve it of its duty, to control their property, to protect their rights to it from the rapacity and faithlessness of the members of the superior race, to discharge faithfully its legal and moral obligations to them, and to execute every trust with which it is charged for their benefit."

And it is difficult to find a higher conception of governmental policy and obligation than is announced in the following:

(pp. 293-294) "It has been and still is the policy of the United States to protect the property and the rights of the Indians under its control, and to teach them agriculture and the arts of civilized life. The Indian reservations, the funds derived from the lease of their right of occupancy to their lands, the lands allotted to the individual Indians, but still held in trust by the United States during the period of restriction upon alienation, the leases of these land made by the Indian superintendents or agents on the terms and conditions fixed by the Secretary of the Interior and approved by him, the tools, animals, houses, improvements and other property furnished to these Indians by the United States, and the proceeds and income from all these, are the means by which the nation pursues its beneficent policy of protection and instruction and exercises its lawful powers of government. If one threatens or proceeds to destroy these means, may not the United States resort to its own courts to prevent such destruction, or to recover the damages caused thereby? 'Every government, intrusted, by the terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of these courts that it has no pecuniary interest in the matter.' "

The learned judge continued to cite many instances in which the power of the Government to sue and protect the Indians and their property has been invoked.

The right so announced is not restricted to land allotments. In the case of United States versus Fitzgerald (C. C. A. 8th 1912), 201 Fed. 295, the same judge allowed the Government to maintain an action for damages for the fraudulent taking of sacks of wool which were sheared from sheep issued to an allottee who was under the supervision, control and management of an Indian agent, and to hold the amount so recovered in trust for the Indian whose property had been injured, because "such suits are lawful aids to redress infringements of its governmental rights, obstructions to the execution of its governmental policy, and interference with the means it is using to carry that policy into effect" (p. 297).

It is admitted that funds derived by the Government from the sale of eighty acres of the allotment of Sam Williams on the Yakima Reservation have been used in equipping Williams with a scow fish wheel, "to teach him * * * the arts of civilized life." It was this wheel, the result of the Government's trust funds, that the defendants saw fit to forcibly injure because it interfered with their rapacity for all the fishing rights in this section of the Columbia River, the same as it was the fraud of the defendant Fitzgerald which deprived the Indian ward in that case of the wool from the sheep allotted to him by the Government. The cases are identical in principle.

The court, on the question of citizenship of the allottee and the Government's right to control his property, forcibly remarked:

> (p. 296) "Assuming that under Act February 8, 1887, c. 119, 24 Stat. 390, S. 6, the Indian allottee had become a citizen of the United States and of the State of Utah, his admission to citizenship did not necessarily withdraw him or his property from the supervision, control and protection of the United States."

Sam Williams' allotment and his retention under the control of Congress, through its Indian agent, are the material things and his disassociation from his tribe (and even if tribal relations were severed it would not interfere with his right to share in tribal property—172 Fed. 308), his departure from the reservation of his adoption (both of which are matters of residence), his taking up civilized life and a homestead, are but voluntary acts of the individual who cannot divorce himself from wardship imposed upon him by Congress. As long as Congress has seen fit to deprive him of a full patent, so long as it prevented him from assuming a status *sui juris*.

The following declaration by Judge Sanborn, in the Fitzgerald case, 201 Fed. 295, is applicable to the wardship and consequent duty of the Government. He said:

> (p. 296) "The United States has the power, and for more than a century it has been, and still is, its governmental policy to protect the Indians and their property from the force, fraud,

cunning and rapacity of the members of the superior race, and to teach them the arts and induce them to adopt the habits of civilization. Indian reservations, allotments of land in severalty with restrictions on alienation held in trust for the Indians, leases thereon on terms prescribed or approved by the Secretary of the Interior, agricultural implements, houses, barns, domestic animals, and other property furnished to the Indians by the United States, or held by the Indians subject to its control and management, are the means by which the United States exercises its power and carries into effect its policy to protect these Indians and their rights of property, and to teach them to abandon nomadic habits and become farmers, laborers, clerks and business men. The United States may lawfully maintain suits in its own courts to prevent interference with the means it adopts to exercise its powers of government and to carry into effect its policies. It may maintain such suits, although it has no pecuniary interest in the subject matter thereof, for the purpose of protecting and enforcing its governmental rights and to aid in the execution of its governmental policies."

In conclusion, the true answer to the question of whether the Government should sue in behalf of Sam Williams may be found in these statutes and constitutional provisions, but it is more strongly indicated in the general review which the government must take of

the treaty, legislation, policy and purpose of the nation in its dealing with members of dependent Indian tribes. It is submitted that demurrer should have been overruled and the Government allowed to proceed.

Respectfully submitted,

CLARENCE L. REAMES,
United States Attorney.

ROBERT R. RANKIN,
Assistant United States Attorney.